

Federal Communications Commission

DA 01-274

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Amendment of Section 73.202(b),)	MM Docket No. 00-73
Table of Allotments,)	RM-9861
FM Broadcast Stations.)	
(Hornbrook, California))	

REPORT AND ORDER

(Proceeding Terminated)

Adopted: January 24, 2001

Released: February 9, 2001

By the Chief, Allocations Branch:

1. The Commission considers herein the Notice of Proposed Rule Making ("Notice"), 15 FCC Rcd 10340 (2000), issued in response to a petition for rule making filed on behalf of Logan and Company ("petitioner"), proposing the allotment of FM Channel 255A to Hornbrook, California, as that locality's first local aural transmission service. Petitioner filed supporting comments in response to the Notice. No other comments were filed in this proceeding.

2. As Hornbrook (pop. 350)¹ is not incorporated, the Notice requested the petitioner to provide additional information to establish Hornbrook's status as a *bona fide* community for allotment purposes. In response, petitioner provided evidence of entities specifically identified by street addresses in Hornbrook, such as the Hornbrook Community Bible Church, Grandma's Hornbrook Market, Hornbrook Chevron, and Hornbrook Grange #391. Moreover, petitioner advises that the Siskiyou County Sheriff's Department located in Hornbrook sponsors such organizations as a Community Crime Resistance Program as well as the Siskiyou County Neighborhood Watch. Additionally, we are advised that Hornbrook contains a grocery store, restaurant, saloon, and a beauty shop. Moreover, general government entities located in Hornbrook include the Fish and Game Department, the Food and Agriculture Department, and an Inspection Station. Hornbrook is also served by the Central Oregon & Pacific Railroad. Additionally, petitioner provided a statement by the Hornbrook postmaster, advising that Hornbrook has established community characteristics such as an elementary school, a volunteer fire department, and a water district. Further, the postmaster states that postal service is provided to in excess of 550 delivery addresses, many of which are businesses. Petitioner also provided statements of several residents concerning the attributes of Hornbrook and their sense of unity and involvement in community concerns. Further, petitioner remarks that the closest population centers to Hornbrook are Yreka, California (approximately 20 miles south) and

¹ Population figure was taken from the Rand McNally Commercial Atlas and Marketing Guide (2000 Ed.).

Medford, Oregon (approximately 30 miles north). While Hornbrook is not as isolated as Cal-Nev-Ari, Nevada, 14 FCC Rcd 17153 (1999), petitioner asserts that it is far more self-sufficient than the case of Seven-Locks Broadcasting Co., 37 FCC82 (1964) (where the nature of the suburban communities, all with essential services provided by the county, precludes a showing that they have an identifiable population grouping separate and distinct from all others).

3. In consideration of the above, we conclude that Hornbrook is a community for allotment purposes. It contains an identifiable population grouping with business entities that associate themselves with the residents of Hornbrook. See Garrison, Kentucky, 6 FCC Rcd 1428 (1991).

The One-Step Upgrade Applications At Keno

4. Before the Hornbrook rule making petition was filed initiating this proceeding, two mutually-exclusive applications were filed during a revised filing window for a new FM station on Channel 253A at Keno, Oregon.² The two applications for Channel 253A at Keno are not short-spaced and, therefore, not mutually exclusive with the proposal in this proceeding to allot Channel 255A to Hornbrook. However, prior to the counterproposal deadline in this proceeding, both of the Keno applicants amended their applications requesting to upgrade Channel 253A at Keno on adjacent Channel 254C1 pursuant to the Commission's one-step upgrade rule (see Section 73.3573). These one-step upgrade amendments for Channel 254C1 at Keno are short-spaced under the Commission's minimum distance separation rules to proposed Channel 255A at Hornbrook, and for this reason, at least one of these applicants requests that their applications be considered as counterproposals in this proceeding.

5. Although these amendments are technically in conflict with the proposed allotment of Channel 255A at Hornbrook, they cannot be considered as counterproposals in this proceeding for two reasons. First and foremost, the Commission's one-step upgrade rule in effect at the time that these amendments were filed, Section 73.3573(a)(1), only allowed licensees, permittees, and first-come, first-serve applicants to file one-step upgrade proposals. That rule did not permit mutually-exclusive applicants for a new FM channel such as the applicants involved here to file an application or an amendment to upgrade the class of the Keno channel prior to the counterproposal deadline in this proceeding.³ Indeed, under our precedent, if a higher class channel is made available to a community for the first time, and the originally allotted channel is unlicensed and the pending applications have not been processed, the higher class channel must be made available for application to all interested parties. See Lafayette, Louisiana, 2 FCC Rcd 7303 (1987), app. for review denied, 4 FCC Rcd 5073 (1989). Therefore, these amended applications for Channel 254C1 cannot be considered as counterproposals in this proceeding.

² See Order, 9 FCC Rcd 6844 (1994).

³ While this provision was eliminated from Section 73.3573(1)(1), it has been retained in Section 73.203(a)(1).

6. Second, it appears that at least one of these applicants recognized the technical conflict between Channel 254C1 at Keno and Channel 255A at Hornbrook and stated "The instant application is being filed as a COUNTER PROPOSAL to ... pending Rulemakings to allocate FM Channel 255A at Hornbrook....."⁴ However, this applicant violated Section 1.420(a) of the Commission's Rules as well as the specific language in this proceeding requiring that counterproponents serve the initial petitioner, and this is another basis for not considering that application as a counterproposal.

7. Alternatively, even if we were to consider the amended applications as counterproposals in this proceeding, they would still lose on a comparative basis. Comparative proposals such as these are considered on the basis of our allotment priorities.⁵ Applying these priorities, we note that the Hornbrook proposal triggers priority three because it is a first local transmission service. By way of contrast, the amended Keno applications do not trigger a higher allotment priority. A staff engineering analysis reveals that neither of the upgrade amendments trigger priorities one or two because they would not provide a first or second full-time aural reception service. Instead, they trigger priority four – other public interest matters, as enhanced secondary service. Since it is well established that a first local service under priority three is a higher allotment priority than an upgrade under priority four, the Hornbrook proposal would be favored on a comparative basis.⁶ See also Benton, Clarksville, Dardanelle, El Dorado, Hampton, Harrison, Huntsville, Mena, Ozark and Sherwood, Arkansas; Homer, Louisiana; Sallisaw and Vinita, Oklahoma; Hooks and Kilgore, Texas, 3 FCC Rcd 4840 (1988), recon. denied 7 FCC Rcd 2555 (1992).

8. In view of the above, and based on the interest expressed in providing a first local aural transmission service to Hornbrook, California, we will allot Channel 255A to that community, as requested. As indicated in the Notice, Channel 255A can be allotted to Hornbrook, California, consistent with the minimum distance separation requirements of Section 73.207(b)(1) of the

This rule provides that the only type of applicant that is allowed to file a one-step upgrade proposal is a first-come, first-serve applicant, not an applicant that has filed a mutually-exclusive application pursuant to a filing window.

⁴ See File No. BPED-19950206MB, Ex. E-6.

⁵ The FM allotment priorities are: (1) first fulltime aural service; (2) second full-time aural service; (2) first local service; and (4) other public interest matters. [Co-equal weight is given to priorities (2) and (3).] See Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1982).

⁶ While we recognize that the originally applied for Channel 253A at Keno constitutes a first local transmission service, those applications are not in conflict with the proposal in this proceeding to allot Channel 255A to Hornbrook, California, and that the ultimate winner of the comparative proceeding for Channel 253A at Keno can provide a first local service to Keno notwithstanding the outcome of this rulemaking proceeding. As a result, the appropriate Section 307(b) comparison would be between a first local service on Channel 255A at Hornbrook, California, and upgraded service from a Class A to a Class C1 at Keno.

Commission's Rules, provided the transmitter is located at least 3.7 kilometers (2.3 miles) southwest of the community, utilizing coordinates 41-53-06 NL and 122-35-03 WL, to avoid a short-spacing to Station KAGO-FM, Channel 258C1, Klamath Falls, Oregon.

9. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective March 26, 2001, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

<u>City</u>	<u>Channel No.</u>
Hornbrook, California	255A

10. A filing window for Channel 255A at Hornbrook, California, will not be opened at this time. Instead, the issue of opening this allotment for auction will be addressed by the Commission in a subsequent Order.

11. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

12. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. Questions related to the auction process should be addressed to the Audio Services Division, Mass Media Bureau, (202) 418-2700.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau